

1 lawyer.

2 JUDGE SIPPEL: No, no, no.

3 THE WITNESS: But they were, as it  
4 came right into it, they were similar in  
5 whatever the important metrics were to compare  
6 audiences in the television world for  
7 advertising purposes, for carriage purposes,  
8 for audience appeal carrying purposes.

9 JUDGE SIPPEL: All right. This is  
10 just my -- I'm not a characterization -- but  
11 I'm just framing this in the context of -- as,  
12 basically, really a hypothetical, because I  
13 don't have any specific factual foundation to  
14 ask you this question. But did you get the  
15 impression, or did -- well, let me just ask  
16 the question this way.

17 Did you -- do you think sitting  
18 here today, do you think that when you were  
19 brought in, and you went through the terms and  
20 conditions of your being retained, that  
21 whoever it was that you were talking to at the  
22 company had at least reached an intermediate

1 conclusion, or this is what they strongly felt  
2 was the situation with respect to these three  
3 comparisons, and they were looking for support  
4 from somebody who had the expertise to give to  
5 them?

6 THE WITNESS: Well, I --

7 JUDGE SIPPEL: Please think  
8 careful, now.

9 THE WITNESS: I do, I want to  
10 answer that as clearly as I can. Obviously,  
11 this rests on impressions, not anything said  
12 specifically. Nobody ever said --

13 JUDGE SIPPEL: I understand.

14 THE WITNESS: But my impression  
15 was that the reason they would want to bring  
16 somebody with expertise in this field in was  
17 to document that fact, because they thought it  
18 was true. And this is common in the business.  
19 That doesn't affect what I tell them.

20 JUDGE SIPPEL: No, no, no. You've  
21 answered my question. No, I'm not implying  
22 that at all. Thank you.

1 THE WITNESS: That's a fair  
2 statement.

3 JUDGE SIPPEL: Okay. Anything  
4 else on redirect?

5 MR. SCHMIDT: No redirect, Your  
6 Honor.

7 JUDGE SIPPEL: Well, I hate to  
8 tell you this, but you're excused as a  
9 witness.

10 (Whereupon, the proceedings went  
11 off the record at 3:16 p.m. and resumed at  
12 3:43 p.m.)

13 JUDGE SIPPEL: Be seated. Do you  
14 have a witness?

15 MR. PHILLIPS: Yes, Your Honor.  
16 Tennis Channel would like to call Dr. Hal  
17 Singer to the stand.

18 JUDGE SIPPEL: Dr. Hal Singer,  
19 would you raise your hand, sir?  
20 Whereupon,

21 HAL SINGER  
22 was called as a witness by counsel for the

1       Tennis Channel and, having been first duly  
2       sworn, was examined and testified as follows:

3               JUDGE SIPPEL:  You don't have to  
4       stand up.  That's okay.  I know Mr. Singer has  
5       been on the stand a couple of times in these  
6       cases.  So we're going to start fresh.  All  
7       right?  This is a fresh start.

8               THE WITNESS:  Sure.

9               JUDGE SIPPEL:  New case, fresh  
10       start.  I don't mean to imply there's any  
11       problem.

12              (Laughter.)

13              JUDGE SIPPEL:  Stop digging when  
14       you're in a hole.  Okay.  Let's get started.

15              MR. PHILLIPS:  Yes.  Thank you.

16              Well, Judge Sippel, I know you are  
17       aware of Dr. Singer's qualifications, but I  
18       thought I might run through them briefly for  
19       you.

20              JUDGE SIPPEL:  Please do.

21              DIRECT EXAMINATION

22              BY MR. PHILLIPS:

1           Q       Dr. Singer, could you briefly  
2 describe for the Court your background?

3           A       Sure. I am an economist. I have  
4 a Master's and a Ph.D. in economics from Johns  
5 Hopkins. I have written extensively on a lot  
6 of the areas that are covered here today.  
7 Among my areas of expertise are industrial  
8 organization, competition economics,  
9 regulation, and finance.

10                   I have co-authored a book on  
11 broadband communications. I have written  
12 dozens of articles in peer-reviewed economics  
13 and law reviews.

14                   I have been involved in a lot of  
15 cases that touch on media. And I consider  
16 myself an expert in the economics of meeting  
17 industries generally and cable programming in  
18 particular.

19           Q       Could you describe what your  
20 current position is, current position and  
21 employment?

22           A       Sure. I am currently Managing

1 Director at Navigant Economics. I have also  
2 recently served as an adjunct professor at  
3 Georgetown Business School.

4 Q Now, you say you have published  
5 articles. Can you describe those for me  
6 briefly? Have you posted articles in  
7 peer-reviewed journals?

8 A Yes, I have. I have published  
9 dozens of articles in peer-reviewed journals,  
10 including some on topics that touch on some of  
11 the issues here today, including the problems  
12 of vertical integration in the cable industry,  
13 including what a non-discrimination standard  
14 would mean in the internet space, and vertical  
15 foreclosure issues generally in the media.

16 Q And have you presented expert  
17 testimony before?

18 A Yes, I have, including on the very  
19 topics that we are talking about here. I have  
20 offered expert testimony, both in program  
21 carriage cases and program access cases.

22 On the program carriage front,

1 just to kind of quickly roll through, I served  
2 as MASN's expert in what was called phase 2 of  
3 a -- which is basically a valuation expert in  
4 its case against Time-Warner. I served as  
5 MASN's expert against Comcast. I served as  
6 the NFL's expert against Comcast. And on the  
7 program access side, I've served as Dish's  
8 expert against a network called CSN, which is  
9 owned by Comcast, CSN California.

10 Q What bodies have you appeared  
11 before to give testimony? What agencies?

12 A I have given testimony in several  
13 different fora, usually federal courts, but I  
14 have been before the DOJ, the FCC, the FTC.  
15 I have offered testimony in various Canadian  
16 fora. Those are the ones I can think of.

17 Q Dr. Singer, you mentioned that you  
18 actually have given testimony on behalf of  
19 Dish Network. Have you served as an economic  
20 expert for other distributors?

21 A Yes. I've written papers and  
22 served as a consultant for various what I call

1 MVPDs or distributors, including AT&T and  
2 including a coalition of MVPDs called  
3 Broadband for America.

4 Q Did you prepare expert testimony  
5 in this case?

6 A I did.

7 MR. PHILLIPS: If I may, Your  
8 Honor, I would like to approach and hand out  
9 copies of Dr. Singer's testimony.

10 JUDGE SIPPEL: Thank you. Thank  
11 you. This is Tennis Channel exhibit 16  
12 marked. Okay.

13 (Whereupon, the aforementioned  
14 document was marked for  
15 identification as Tennis Channel  
16 Exhibit Number 16.)

17 MR. PHILLIPS: And, Your Honor, I  
18 would like to move Tennis Channel exhibit 156  
19 into evidence.

20 JUDGE SIPPEL: Any objection?

21 MR. CARROLL: Subject to cross, no  
22 objection.



1 JUDGE SIPPEL: Subject to cross,  
2 it stands as Tennis 16.

3 (Whereupon, the aforementioned  
4 document, having previously been  
5 marked for identification as  
6 Tennis Channel Exhibit Number 16,  
7 was received in evidence.)

8 BY MR. PHILLIPS:

9 Q Dr. Singer, exhibit 16, can you  
10 tell me what that is?

11 A Yes. It is my written testimony  
12 in this case.

13 Q And can you briefly summarize the  
14 expert opinions that you are offering today,  
15 sir?

16 A Sure. In summary, I have  
17 concluded that Tennis Channel is similarly  
18 situated to Comcast national sports networks;  
19 in particular, Golf Channel and Versus.

20 I've concluded that Comcast treats  
21 the Tennis Channel differently and, in fact,  
22 worse than it treats its own affiliated

1 national sports networks that are similarly  
2 situated with Comcast. And, finally, I have  
3 concluded that, as a result of that disparate  
4 treatment, Tennis Channel has suffered harm.  
5 And that harm is rebounded to the harm of  
6 advertisers and viewers.

7 Q Are you familiar with findings  
8 that were made in a recent order by the FCC in  
9 connection with the NBC-Universal merger?

10 A Yes, I am.

11 Q Is it your expert opinion  
12 consistent with those findings?

13 A It is consistent with. I think  
14 that's a fair way of putting it. In the FCC's  
15 merger order, the FCC found that Comcast  
16 treated its affiliated sports networks, Golf  
17 and Versus, better or more favorably than  
18 Comcast peers in the same geographic markets.  
19 And they found that Comcast did so for  
20 anti-competitive reasons.

21 What I am finding here is that  
22 Comcast is treating Tennis Channel worse than

1       it treats its affiliated networks and is doing  
2       so for competitive reasons.

3               Q       Dr. Singer, in your written  
4       testimony, I would like to just go through the  
5       bases and the analysis detail. In your  
6       written testimony, you talk about  
7       discrimination. Can you tell me what you mean  
8       by "discrimination"?

9               A       Sure. To economists,  
10       discrimination is treating two similarly  
11       situated things differently based on some  
12       outside factor that the candidates have no  
13       control over. Discrimination accordingly has  
14       no meaning unless it is evaluated in the  
15       context of a comparison. That is, it has to  
16       be an analysis that compares the treatment of  
17       one person against another person.

18              Q       That would be similar to the  
19       discriminatory equation you probably heard me  
20       talk about in my opening?

21                      MR. CARROLL: Objection, Your  
22       Honor. I don't mind this witness testifying

1 on economic matters, but he's not here to give  
2 legal opinions about what Your Honor will be  
3 deciding what the legal standard for  
4 discrimination is. If he's limited to  
5 economics, I'm fine, but I don't think he  
6 should be commenting on legal standards.

7 JUDGE SIPPEL: Well, maybe so, but  
8 that's kind of a -- it's actually become a  
9 narrow gauge. I'm somewhat familiar with this  
10 witness' approach to testifying. I can assure  
11 you that's not going to happen. It's just not  
12 going to happen.

13 MR. CARROLL: Okay. Thank you,  
14 Your Honor.

15 JUDGE SIPPEL: And I have people  
16 here who will stop it if it does happen.

17 (Laughter.)

18 MR. CARROLL: I'm feeling  
19 perfectly at ease. Thank you.

20 THE WITNESS: Can I answer your  
21 question from an economic perspective?  
22 Applied here to an economist, one cannot

1 evaluate whether Comcast engaged in  
2 discriminatory conduct against Tennis Channel  
3 without a relevant comparison group. It can't  
4 be done in the abstract. It has to be done as  
5 compared to Comcast treatment to some  
6 comparator.

7 In this case, that comparator is  
8 Comcast-affiliated national sports networks.

9 BY MR. PHILLIPS:

10 Q And, among the group of  
11 Comcast-affiliated national sports networks,  
12 did you examine any networks in particular?

13 A Sure. The two that I focused my  
14 attention on are the Golf Channel and Versus,  
15 but Comcast also owns -- and it's important,  
16 Your Honor, to distinguish Comcast owns those  
17 networks in an entirety. Okay? By  
18 comparison, Comcast owns minority interests in  
19 a host of other national sports networks.

20 And I do think that it's  
21 informative for the purpose of making a  
22 determination of whether Comcast engaged in

1 decisions on the basis of affiliation to look  
2 at the totality of Comcast carriage decisions,  
3 not just for Versus and Golf but for all of  
4 the networks in which they either own or do  
5 not own equity.

6 Q What did you conclude based on  
7 this examination?

8 A I conclude that affiliation  
9 appears to explain to a very high degree the  
10 decision-making behind Comcast and how it  
11 treats cable networks.

12 MR. PHILLIPS: I would like to,  
13 Your Honor, if I may, approach --

14 JUDGE SIPPEL: Yes, sure.

15 MR. PHILLIPS: -- distribute as  
16 Tennis Channel exhibit 190 a chart, which is  
17 really a take-out in a single page of a chart  
18 that is already contained in Dr. Singer's  
19 testimony.

20 JUDGE SIPPEL: Absolutely.

21 (Whereupon, the aforementioned  
22 document was marked for

1 identification as Tennis Channel  
2 Exhibit Number 190.)

3 JUDGE SIPPEL: I just want to ask  
4 a question. If Comcast owns only minority  
5 interests in a sports network, how can they  
6 control the decision-making?

7 THE WITNESS: No. They can  
8 control. Comcast, the distributor, can decide  
9 the extent to which it is going to carry a  
10 network in which it owns a minority interest.

11 JUDGE SIPPEL: Minority interest.  
12 I see. Okay.

13 THE WITNESS: And what I am going  
14 to try to demonstrate here is that Comcast is  
15 basing its decisions largely around whether or  
16 not it owns equity in a sports network.

17 JUDGE SIPPEL: Taking this  
18 hypothetically from my own, you start with the  
19 100 percent integrations, which is Golf and  
20 Versus, and then you go down from there. And  
21 you're going to find a similar pattern.

22 THE WITNESS: Exactly.

1 JUDGE SIPPEL: All right.

2 BY MR. PHILLIPS:

3 Q Indeed, Dr. Singer, if we pick up  
4 on the pattern that Judge Sippel was just  
5 asking about, what does this table 1 at 190,  
6 which is taken from your expert opinion, show?

7 A And I'm sorry. Can you tell me  
8 the page?

9 MR. PHILLIPS: You're the --

10 JUDGE SIPPEL: Did I get a copy?  
11 Well, I was engaged in a deep discussion with  
12 Dr. Singer.

13 MR. PHILLIPS: I apologies. I  
14 think I can -- there is another copy, but I  
15 think I forgot to --

16 THE WITNESS: This is helpful.

17 JUDGE SIPPEL: I wanted to be sure  
18 I used the word "pattern" so that Mr. Carroll  
19 realized I'm doing my own legal analysis here,  
20 trying to keep everybody happy, content, and  
21 confident.

22 Dr. Singer?



1 THE WITNESS: Yes?

2 BY MR. PHILLIPS:

3 Q So, Dr. Singer, exhibit 190 is a  
4 chart from your expert report. Is this a  
5 chart you prepared?

6 A Yes, it is.

7 Q And can you explain it for the  
8 Court, what this chart signifies?

9 A Sure. So, as you see, you know,  
10 there are three different columns here. And  
11 what I'm just trying to do, quite simply, is  
12 show what a Comcast subscriber gets to watch  
13 based on what tier he or she subscribes to.  
14 So let's start on the left. I just think  
15 that's the easiest. We can start from the  
16 right, but let's just start on the left.

17 This is called the digital starter  
18 tier. And this is the basic package, if you  
19 will. So if you pay for the most slimmed-down  
20 version of service that Comcast offers, you  
21 will get ESPN, ESPN II, Golf Channel, and  
22 Versus, among others, but I am just looking at

1 national sports networks for the purpose of  
2 this table. Okay?

3 If you pay a little more and  
4 upgrade to what Comcast calls the digital  
5 preferred tier, you get additional sports  
6 networks. And those are the ones down the  
7 middle column: ESPN News; ESPN U; Major  
8 League Baseball Network -- that's MLB -- NBA,  
9 TV National Basketball Association; NHL,  
10 National Hockey League; and the NFL Network.  
11 Okay?

12 And, finally, the third column is  
13 if you pay an additional five to seven or  
14 eight dollars a month, you can also get the  
15 networks that are on what Comcast calls the  
16 sports entertainment tier. And that would be  
17 Fox College Sports, Tennis Channel, CBS  
18 College Sports, Golf TV, NFL Red Zone, the  
19 Soccer Network, and ESPN Classic.

20 JUDGE SIPPEL: I don't see MASN on  
21 here.

22 THE WITNESS: That is because,

1 Your Honor, I am only listing national sports  
2 networks.

3 JUDGE SIPPEL: Oh, I see. Okay.

4 THE WITNESS: Right?

5 JUDGE SIPPEL: I was a little bit  
6 worried because we did a lot of work on that.

7 (Laughter.)

8 THE WITNESS: We did a lot of  
9 work. We did a lot of work to get them there.

10 JUDGE SIPPEL: All right.

11 BY MR. PHILLIPS:

12 Q Dr. Singer, if I may, so if I  
13 understand the chart, the first column,  
14 "Digital Starter," those are the networks, the  
15 sports networks, that are nationally  
16 distributed on a digital starter tier. Is  
17 that correct?

18 A Correct.

19 Q You know, what is the level of  
20 penetration?

21 A I'm sorry. I meant to go through  
22 that as I went through. So, again, to orient,

1 Your Honor, about of Comcast  
2 subscribers have access to what is called the  
3 digital starter tier. Okay?

4 So if you're carried on that tier,  
5 you're a network and you're carried on that  
6 tier, you have a luxury of getting to hit a  
7 full of Comcast -odd  
8 subscribers nationwide. Okay?

9 The digital preferred tier is only  
10 subscribed to by roughly of Comcast  
11 subscribers. Okay? So that's better. It's  
12 not as exciting for a network as , but  
13 is certainly better. And that is this  
14 middle tier.

15 The final tier, sports  
16 entertainment tier, only enjoys I believe on  
17 average about a penetration among  
18 Comcast subscribers. And when you do the  
19 math, that comes out to roughly about  
20 subscribers only nationwide.

21 Q Now, have you observed, Dr.  
22 Singer, any relationship that appears to

1 explain why certain of these networks appear  
2 in certain of these columns?

3 A Sure. So I've added a column  
4 titled "Affiliation." And "affiliation" is  
5 just a fancy word for whether or not Comcast  
6 owns equity in your network. In certain  
7 cases, Comcast owns the entire network, which  
8 is Golf and Versus.

9 And the pattern that I observe and  
10 I would like to try to be able to explain is  
11 that if your network is not owned by Comcast  
12 at all; that is, if you are a truly  
13 independent network, then you wind up with  
14 only one or two exceptions that I will go into  
15 being relegated to the sports entertainment  
16 tier. Okay? And that's Fox College, Tennis  
17 Channel. You can go down.

18 But, Your Honor, what all of those  
19 have in common is that they have not yet  
20 granted Comcast equity in their network. To  
21 say it differently, Comcast has not yet  
22 extracted a portion of the equity in their

1 network. And they are all on the sports  
2 entertainment tier.

3 JUDGE SIPPEL: Let me  
4 characterize. So all of these programs that  
5 are listed on the third column, sports  
6 entertainment, Comcast has no equity interest  
7 in. Am I right in saying this? They seek no  
8 equity in? That we don't know?

9 THE WITNESS: We don't know.

10 JUDGE SIPPEL: But they don't have  
11 any?

12 THE WITNESS: They don't have any  
13 as of today. I mean, just to orient ourselves  
14 or to reorient ourselves to the NFL matter,  
15 you recall that Comcast was going to place NFL  
16 on the sports entertainment tier. This was  
17 what caused us to enjoy ourselves two years  
18 ago.

19 JUDGE SIPPEL: In the courtroom,  
20 right?

21 THE WITNESS: Yes, unless NFL  
22 would surrender its equity rights in the

1 Thursday night football games. And that's  
2 what led to the big dust-up. NFL said, "No.  
3 We want those. We want those rights to our  
4 own network." And they sued Comcast. And  
5 that's what brought us here two years ago.

6 JUDGE SIPPEL: The distinction,  
7 though, that's on the contract side. And the  
8 violation is based only on the discrimination  
9 side. So, even without a contract, if there  
10 was discrimination going on, there could be a  
11 problem?

12 THE WITNESS: There could be. I  
13 was just trying to answer your question of, do  
14 we know that Comcast wants to own all of these  
15 networks. I can't say that I know that they  
16 want to own.

17 JUDGE SIPPEL: You answered --

18 THE WITNESS: I can't say that.  
19 But we know that there are occasions in which  
20 Comcast posture towards the independent  
21 network was that you're not going to get more  
22 favorable treatment unless you either gave us

1       the rights to certain content you're carrying  
2       or you just give us equity in the network.  
3       And I'm going to take you through a few of  
4       those examples today. Okay?

5               JUDGE SIPPEL: And you charge us  
6       less for your program? It would be another  
7       third alternative?

8               THE WITNESS: That could be an  
9       alternative, sure. I mean, price certainly  
10      matters in the decision calculus, no doubt.  
11      But so does equity.

12              BY MR. PHILLIPS:

13              Q       And, Dr. Singer, if I may refocus  
14      you to the middle column?

15              A       Sure.

16              Q       Now, "affiliation" I take it there  
17      means the same thing. The "No" or "Yes"  
18      refers to whether or not Comcast has any  
19      ownership interest in the network?

20              A       That is correct. And now you will  
21      see that all of the "Nos" have flipped to some  
22      "Nos" and some "Yeses." Yes. To answer your



1 question, "affiliation" in this column -- I  
2 mean, it means the same thing in every column,  
3 but when it says, "Yes" here when we go and  
4 look at MLB, MBA, and NHL, those are minority  
5 ownership shares. Those are not full shares.

6 Now, you see two counter-examples,  
7 kind of my general hypothesis that it takes a  
8 little equity for you to get out of the  
9 doghouse. Okay? Those counter-examples are  
10 the NFL network and ESPN. You see those with  
11 the "Nos" next to them in the middle column?

12 Q I do.

13 A So you can say, "Come on. You  
14 don't have to have equity." Well, let's just  
15 kind of review the bidding. With the NFL  
16 network, the reason why and the only reason  
17 why the NFL is there is that that was a  
18 settlement that dissolved a discrimination  
19 complaint in which Comcast's prior position  
20 was that NFL would never see digital preferred  
21 tier. Okay?

22 And then when you look at ESPN,

1 ESPN is a counter-example, but ESPN is a very  
2 special case. ESPN is in a special class  
3 among all sports networks nationwide. They  
4 have some of the most valuable sports  
5 programming. And it would be truly dangerous  
6 for Comcast or for an MVPD to try to push ESPN  
7 around in a sense that you could actually get  
8 subscribe defection if you told your  
9 subscribers that they were going to have to  
10 pay five day dollars extra a month to get  
11 access to ESPN. Okay?

12 But with the exception of those  
13 two, which I think are very understandable  
14 exceptions once you get into the wheat, the  
15 other networks there are affiliated with  
16 Comcast. Okay? So I am going to stick with  
17 this contention that a little equity will get  
18 you off the sports tier. Okay?

19 And, turning now to the left  
20 column --

21 Q Hold on, Dr. Singer. Which also  
22 has the affiliation sub-column. Can you